FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Getman and Commissioners Downey, Knox and Swanson

From: C. Scott Tocher, Commission Counsel
Luisa Menchaca, General Counsel

Re: Proposition 34 - Advertising Disclosure – Repeal of emergency amendments to Regulation 18402 and adoption of amendments to Regulation 18402; Permanent adoption of emergency regulations 18450.3, 18450.4 and 18450.5; and Pre-notice Discussion of Proposed Regulations 18450, 18450.1 and 18450.2.

Date: April 23, 2002

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To implement the advertising disclosure requirements recently enacted by the voters with Proposition 34, the Commission has considered and adopted several emergency regulations. Emergency regulations adopted by the Commission in January of this year sought to establish rules for advertising disclosure by primarily formed ballot measure committees and others in the state primary election in March of 2002. At the Commission's request to provide input regarding the adequacy of the regulations and with the upcoming expiration of the emergency regulations, the Commission is asked to consider whether they should be adopted permanently.[1] This memorandum, where appropriate, makes suggestions for amendment and discusses other issues the Commission may wish to address through additional regulations. **The Commission is asked to permanently adopt the four emergency regulations adopted in January and consider pre-notice drafts of three additional regulations.** (The regulations are attached as Exhibit 1.)

I. BACKGROUND

Government Code sections 84501 - 84511[2], added to the Act by Proposition 208, pertain to the disclosure of major funding sources for campaign advertising. Proposition 34 and Senate Bill 34 further amended these statutes.[3]

A. Summary of the Primary Advertising Statutes:

Generally speaking, the statutes comprise two distinct sets of advertising disclosure rules. One set covers disclosure in political advertisements related to *ballot measures.* (Sections

[1] The emergency regulations adopted by the Commission at its January 2002 meeting shall expire by operation of law on May 25, 2002.

[2] All statutory references are to the Government Code, unless indicated otherwise.

[3] For the Commission's convenience, a table of the advertising disclosure statutes is attached as Exhibit 2.

84501-84504.) The second set addresses political advertising that is an *independent expenditure* paid for by a committee, whether the advertisement relates to a candidate or a ballot measure. (Section 84506.) These sections present a complex statutory scheme, resulting in a "layering" of requirements. Since the Commission already has considered on several occasions the entire statutory scheme related to advertising disclosures, staff presents a summary only of the primary disclosure statutes that are implicated in the decisions called for in this item.

DISCLOSURES REQUIRED

The meat and potatoes of the advertising disclosure statutes are threefold. Sections 84503, 84504, and 84506 require certain disclosures in advertisements. **Sections 84503 and 84504** require a **disclosure statement in ballot measure advertising**. The third, section **84506**, includes **both ballot measure advertising and candidate advertising** in its disclosure requirements. Different information is required in the disclosure statements, depending on which section applies.

1. Section **84503** requires a disclosure statement identifying any person whose cumulative contributions are $50,000 or more. Subdivision (b) of that statute instructs that if there are more than two such donors, the committee is required to disclose only the highest and second highest donors. Again, this statute only applies to ballot measure advertising.

2. Section **84504** outlines how a committee must identify itself in its name when advertising in support or opposition of a ballot measure. This section seems to *add* to the requirements found in section 84503 by specifying that a committee identify itself with a name or phrase that "clearly identifies the economic or other special interest of its major donors of fifty thousand dollars ($50,000) or more in any reference to the committee required by law, including, but not limited, to its statement of organization filed pursuant to Section 84101."

Thus far, in ballot measure advertising, these statutes require disclosure of the two highest contributors of $50,000 or more, and committee identification including the economic or special interest of its major donors of $50,000 or more. Section 84504 goes on to require that if the major donors of $50,000 or more share a common employer, the identity of the employer shall also be disclosed in the advertising. The statute further requires that any committee that supports or opposes a ballot measure shall print or broadcast its name as provided in this section as part of any advertisement or *other paid public statement*.

Section 84504 reaches beyond the advertising arena in requiring that a committee name contain certain information *in any reference to the committee required by law*. The section specifies that this includes the committee's statement of organization, filed pursuant to section 84101.

3. Section **84506** is the first section that seeks to govern both ballot measure advertising and candidate advertising. The common thread here is that this applies to broadcast or mass

mailing advertisements, advocating the election or defeat of any candidate or ballot measure, funded by *independent expenditures*. This section adds yet another requirement to some advertising disclosures. "If the expenditure for a broadcast or mass mailing advertisement…is an independent expenditure, the committee…shall include on the advertisement the names of the two persons making the largest contributions to the committee making the independent expenditure. If an acronym is used to specify any committee names required by this section, the names of any sponsoring organization of the committee shall be printed on print advertisements or spoken in broadcast advertisements."[4]

The practical result is that there are multiple requirements for advertising disclosure contained in these statutes, several of which are not mutually exclusive. Rather, they can be viewed as "layered," calling for more and more disclosure information, some of which may in fact be duplicative.[5]

II. THE MARCH PRIMARY ELECTION AND THE EMERGENCY REGULATIONS

In January of this year, the Commission adopted four emergency regulations to give guidance to the regulated community and public in time for the March statewide primary election. Those regulations are set to expire on May 25.

A. The Emergency Regulations.

The emergency regulations address approximately four primary issues.

- The committee naming requirements are limited to ballot measure committees, as opposed to general purpose committees. (Reg. 18402.) The Commission heard argument, for instance, that application of some of the advertising statutes to candidate-controlled committees would yield absurd or awkward results.
- The Commission decided, both for disclosure and for committee naming purposes, how to define the "economic or other special interest" of committees and large donors. (Reg. 18450.3.) This determination impacts how committees disclose in advertisements the interests of their largest donors and also how committees name themselves (and also whether such must be amended from time to time).

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[4] Section 84508 can also be classified as a disclosure statute, although it really serves to limit the scope of the disclosure required under sections 84503 and 84506 to a committee name and its highest major contributor, if the advertisement is of a smaller scale, as specified in the section.

[5] For example, a print advertisement for or against a ballot measure, measuring 30 square inches, which is funded through independent expenditures, must include in the advertisement the committee name (section 84504); the committee name must include a name or phrase clearly identifying the economic or other special interest of its major donors of $50,000 or more (section 84504(a)); the names of the two persons making the largest contributions to the committee making the independent expenditure (84506); and possibly the name of the common employer, if the two largest contributors share a common employer (section 84504(b)).

- The Commission decided that committees must use specific language in advertisements to identify their largest contributors that gave significant support to the sponsoring committee. (Reg. 18450.4.)
- The Commission decided the circumstances under which any filings must be amended and the time allotted to do so. (Reg. 18450.5.)

B. The March Primary Election.

As one campaign adviser noted at the interested persons meeting held in the Commission's offices after the election, the March 2002 primary election was unique for purposes of the advertising regulations.[6] This is the result of the confluence of two significant factors: 1) the Commission's determination to apply the committee naming requirements of section 85304 only to primarily formed ballot measure committees (emergency regulations 18402 and 18450.3), and 2) the lack of controversial industry-sponsored initiatives.

The Commission accepted staff's recommendation in January to limit the committee identification requirement of section 84504 to primarily formed ballot measure committees. Under this rule, a primarily formed ballot measure committee must identify itself using a "name or phrase" that "clearly identifies the economic or other special interest" of its major donors of $50,000 or more.[7] Under section 84503, in any advertisement by the committee the advertisement must also identify its two largest contributors of $50,000 or more. While these provisions apply to both state and local measures, it is traditionally statewide measures that attract the largest contributions.

On the ballot this year were six measures: 1) Proposition 40 – the clean air and water bond; 2) Proposition 41 – voting technology modernization act; 3) Proposition 42 – gas tax allocation act; 4) Proposition 43 – right to have vote counted; 5) Proposition 44 – chiropractor discipline; and 6) Proposition 45 – legislative term limit extension. While several of these measures generated broad interest among donors and the public, many analysts opined that this year's ballot lacked significant controversial measures that pit large interests against one another. In fact, no committees were registered with respect to propositions 43 and 44 and no opposition committees ever formed against propositions 40 and 41. Nevertheless, these measures provide some information about the functionality of the regulations. Examples follow:

Example 1: <u>Proposition 40</u>: was a nearly $3 billion bond measure to conserve natural resources (land, air, and water), to acquire and improve state and local parks, and to preserve historical and cultural resources.

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[6] The interested person's meeting was held April 4. In attendance were Commission staff, several political campaign advisors, and other members of the regulated community. The notice for the meeting invited all interested persons to share with staff their particular experiences with the campaign regulations, whether as a voter or as a regulated entity subject to the regulations.

[7] Note that this requirement is different from the *advertising* disclosure of section 84503, which requires disclosure of only the *top two* contributors of $50,000 or more.

Yes Side:[8] *Name*: "Yes on 40. Protect California's Land, Air and Water. Supported by Conservation Groups and Owners of Open Space." (Exhibit 3.)

Advertising Disclosure: "Yes on 40. Protect California's Land, Air and Water. Supported by Conservation Groups and Owners of Open Space. Major funding provided by The Nature Conservancy Action Fund and other supporters of Prop 40 and natural resource protection, and Peninsula Open Space Trust." (Exhibit 4.)

Yes Side: *Name*: "Nature Conservancy Action Fund, Other Prop. 40 and Resource Protection Supporters." (Exhibit 5.)

Advertising Disclosure: Unknown.

The attached documents with respect to each committee detail the contributions received by each committee. In the case of "Yes on Prop. 40," the two largest contributors at the time were disclosed in advertisements. One of the largest contributors was the second committee listed above, the Nature Conservancy Fund. As primarily formed ballot measure committees, each was obligated to abide by the committee identification and advertising disclosure requirements of sections 84503 and 84504. The second committee, the Nature Conservancy Fund, illustrates an example of how helpful (or unhelpful) identification of a committee's major donors in its name turns out to be. The attached documents reveal approximately 16 contributors to the Nature Conservancy committee that must be considered in identifying "the economic or other special interests" in the committee's name. Included are approximately three individuals and other corporations. The name of the committee, however, seems to lump all contributors together as "Other Prop. 40 Resource Protection Supporters." While staff does not render an opinion as to whether this complies with the Commission's regulations, it provides at least an example of how one committee has interpreted its obligations under the regulations.

Example 2: Proposition 42: This measure dedicates gasoline sales tax receipts to specific and general transportation projects.

Yes Side: *Name*: "Yes on 42 – Taxpayers, Construction, Business, Labor, Engineers." (Exhibit 6.)

Advertising Disclosure: "Taxpayers for Traffic Relief/Yes on 42 – A Coalition of Taxpayers, Construction, Business, Labor, Engineers and Commuters With Funding from Granite Construction and A. Teichert & Sons."[9] (Exhibit 7.)

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[8] There were no committees registered to oppose Proposition 40.

[9] Note that the committee in the advertisement is different from the most recent name registered with the Secretary of State. The name apparently must have been amended after the order to place the advertisement was made.

No Side: *Name*: "No on 42, A Coalition for Teachers and Service Employees Who Oppose Diverting Funds from Schools, Hospitals and Seniors." (Exhibit 8.)

Advertising Disclosure: Unknown.

In this campaign, we see that the "yes" side identified itself most recently to include five groups. In its advertisements, the two largest disclosed contributors identified are two construction companies. Documents on file with the Secretary of State indicate the California Alliance for Jobs contributed $750,000 by February 21st, the deadline of the preelection campaign statement. This exceeds the amount contributed by Granite Construction (approximately $554,500) and A. Teichert & Sons (approximately $400,000). One is unable to determine on the basis of these facts alone, however, whether the Commission's regulations were followed. Without further investigation to identify the date the advertisement was ordered, one cannot determine compliance.[10]

Example 3: Proposition 45: This proposition would have extended legislative term limits.

Yes Side: *Name*: "Yes on 45. Citizens' Right to Vote. A Coalition to Improve Term Limits Sponsored by Firefighters, Teachers, Seniors, Retailers, the Chamber of Commerce and the League of Women Voters." (Exhibit 9.)

Advertising Disclosure: Unknown.

No Side: *Name*: "No on 45: Stop the Politicians, Sponsored by Americans for Limited Terms." (Exhibit 10.)

Advertising Disclosure: Unknown.

In addition to the conventional disclosures on the filings and advertisements described above, some committees also "advertised" on their own websites. For instance, attached as Exhibit 4 is a video "capture" of televised advertisements that could be seen on the "Yes on 40" website. The examples illustrate how the disclosure requirements were met with respect to broadcast advertisements. Websites were used in other ways, as well. The "Yes on 42" campaign (the gasoline transportation tax) had links on its website from which one could download "Yes on 42" signs. (Exhibit 11.) The signs contained the identification of the committee as well as the top two contributors (as described above in "Example 2"), although smaller printable labels did not. (Exhibit 12.)

[10] The Commission may decide now or in the future to amend regulation 18450.4 to require advertisements be dated in some fashion. Including the date requirement may encourage compliance and reduce false accusations of non-compliance.

In addition to the committee name and contents of advertisement disclosures, the emergency regulations adopted by the Commission pertained to the amendment process should advertisements need to be changed due to a change of the name of the committee or because a new contributor had to be disclosed. (Emerg. Reg. 18405.5.) Based on information obtained by Commission staff and input from interested persons, however, it is not clear that this regulation was thoroughly "tested" by real-world experience. One of the results of the lack of controversial industry-sponsored initiatives was the lack of an intense back-and-forth campaign in the waning days of an election. This meant, given the generally docile nature of the initiative campaign season, that campaigns did not face traditional pressures to update advertisements at the last minute nor confront significant last-minute contribution scenarios. As a result, the amendment of advertisements to reflect changes that would be associated with the heat of such a campaign failed to materialize. Nonetheless, interested persons did not indicate any particular problems with regulation 18405.5. Some political consultants acknowledged, in fact, that they advised clients to settle on their name and other disclosures and be very cautious about accepting contributions that would require alteration. It is uncertain whether such a strategy would work in a "normal" campaign environment.

To summarize, it appears the regulatory approach adopted by the Commission was successful, even if the test case was not as rigorous as one may have hoped. Most importantly, perhaps, it appears the Commission's decision to limit the applicability of section 84504, the committee identification statute, to primarily formed ballot measure committees served to limit the potential confusion regarding the disclosure requirements. (Emerg. Regs. 18402, 18450.3.) For example, the requirement for committees to link disclosure of their largest contributors to the their status as a major donor was effective and, one must assume, helpful. This is especially true given the propensity of some disclosure statements to be quite lengthy. Using the signal phrasing of "major funding" assists the voter in segmenting the information disclosed.

Nevertheless, the election exposes certain areas that may require further attention in the future, either through regulation or staff advice. First, significant informal advice to the community consisted of assisting committees when working through the process of selecting a name that complied with the requirements of emergency regulation 18450.3. This was especially true where the contributor was an individual and the measure was one of broad non-specific economic impact. In addition, some have suggested that perhaps Commission regulations could be modified in some manner to allow for a collapsing of perhaps overlapping requirements that result in redundant or repetitive disclosure. These additional issues, and possible remedies, are discussed further below in the context of permanent adoption of the emergency regulations and the pre-notice discussion of other regulations.

III. THE COMPLETE ADVERTISING REGULATORY PACKAGE

Staff presents an entire package for the Commission's consideration, consisting of the four emergency regulations now up for permanent adoption, as well as three additional draft

regulations for pre-notice discussion.[11] Each regulation is presented in numerical order except where the subject matter is such that it may impact more than one regulation, in which case the order is adjusted.

The three draft regulations presented for pre-notice discussion are as follows. The first proposed regulation, 18450, defines the scope of the advertising statutes. It is proposed that a general regulation of this type will clarify in one place the responsibilities of committees under the advertising rules. Depending in part on the decisions the Commission makes with respect to scope issues, the Commission may wish to revisit the issue of defining in proposed regulation 18450.2 the term "cumulative contributions." The Commission may also revisit the issues surrounding the definition of "advertisement" in proposed regulation 18450.1.

A. Adoption of Regulation 18402 – Committee Names:

This regulation is being brought back without change from the version the Commission adopted on an emergency basis in January.[12] At that time, the Commission decided in subdivision (c)(2) to apply the committee name identification requirements only to primarily formed ballot measure committees. **Staff recommends the Commission adopt regulation 18402.**

A primary issue arising from the advertising disclosure statutes is the scope of the committee name identification requirements in the statement of organization and in advertising disclosures. These requirements are found primarily in section 84504, Identification of Committee. Subdivision (a) of that statute states:

> "(a) Any committee that supports or opposes one or more ballot measures shall name and identify itself using a name or phrase that clearly identifies the economic or other special interest of its major donors of fifty thousand dollars ($50,000) or more in any reference to the committee required by law, including, but not limited, to its statement of organization filed pursuant to Section 84101."

As the Commission will recall from earlier deliberations, there is a dispute whether this statute is intended to indeed apply to "[a]ny committee that supports or opposes … ballot measures," or whether, when read in the context of the entire disclosure scheme, this section should apply only to ballot measure committees. (§ 84504, subd. (a), emphasis added.)

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[11] It is staff's intent to bring back the pre-notice regulations with which the Commission decides to proceed at the July 2002 Commission meeting for permanent adoption.

[12] Exhibit 1 has the version of the regulation with underline and strikeouts showing how the regulation will look after the emergency regulation is repealed. The second version, a clean version without strikeout or underline, is how the regulation will look after the emergency regulation is adopted on a permanent basis.

By limiting the scope of section 84504 awkward results are avoided and the statute is harmonized with other aspects of the Act. If "any" is read literally, then a candidate-controlled committee that contributes $500 in support of a ballot measure would have to change its name to reflect the economic/special interests of its major donors of $50,000 or more.[13] Thus, the "John Doe for Assembly" committee would be required to file a new statement of organization under a new name identifying the interests of major donors. This name would appear in requisite disclosures of the candidate in contexts unrelated to the ballot measure campaign, as well. It is argued that this would create confusion and spread disinformation to the public because the "major" donors to the candidate-controlled committee would be identified in advertising disclosures related to a ballot measure to which the donors might not have any interest or connection. The same situation arises with respect to a general purpose committee which receives over $50,000 from several contributors and then becomes involved in a ballot measure election by making contributions to a primarily formed committee. Again, under a literal interpretation section 84504 requires the committee to change its name to include the special interests of its largest donors, creating an awkward and sometimes redundant committee name, and may subject the committee to an enforcement action if the name did not accurately reflect the economic interests of the committee. By limiting the requirements of section 84504 to ballot measure committees only, this problem is resolved.

It has been suggested by some that in the context of sponsored committees the opportunity arises to eliminate potentially duplicative disclosures in advertisements and committee name identification. The suggestion is that, by regulation, the Commission could collapse the requirements of both 84504 and 84102 with respect to sponsored committees which already are required to include the name of their sponsor in the committee name and, perhaps, the industry or other identifiable group if there is more than one sponsor of the committee. (§ 84102, subd. (a); Reg. 18419.) Given, however, that the statutory requirements are explicit in these separate statutes, it is unclear at this moment whether the Commission has the authority by regulation to eliminate the requirements of one statute in favor of another in this particular circumstance. Rather, the Commission may wish at a future date to address this issue legislatively to remedy any potential problem at its source.

Staff recommends the Commission permanently adopt the amendments to Regulation 18402.

[13] In this hypothetical, the amount contributed, $500, is selected randomly. The language of the statute has no threshold defining "support or opposes." Rather, it appears that any financial support of or opposition to a ballot measure committee is sufficient to bring a committee within the ambit of section 84504.

B. Pre-notice Regulation 18450 – Scope. Advertisement Disclosure.

This is a new draft regulation that defines the scope of the advertising statutes comprised of sections 84501 through 84510. It is staff's goal that such a regulation would be a helpful reference for the public as to the obligations of certain committees under these statutes. This is especially true given the complicated interrelationships of the statutes.

In assessing the regulation, it is helpful to keep in mind the three primary facets of the advertising statutes. First, section 84503 requires the disclosure of the top two contributors of $50,000 in "any advertisement" for or against a ballot measure. (§ 84503, subd. (a).) Second, section 84504 requires committees supporting or opposing ballot measures to identify themselves (name identification) in a way that includes the economic interests of their major donors of $50,000. (§ 84504, subd. (a).) Third, section 84506 requires disclosure in an advertisement of the two largest contributors to a committee making an independent expenditure with regard to a candidate or ballot measure. This regulation describes to whom each of the three sections applies.

1. The Scope of Section 84503 – Is it Limited in the Same Manner as Section 84504?

Subdivision (a) of the regulation interprets sections 84503 and 84504 to apply only to primarily formed committees, as that term is defined elsewhere in the Act. As discussed above in section B of this memorandum, the Commission already has decided that section 84504 is limited to primarily formed ballot measure committees. Therefore, the only new issue presented in this subdivision is whether, likewise, section 84503 is limited to primarily formed committees.

To be sure, section 84503 states "any advertisement" regarding a ballot measure must contain the requisite disclosure. Read alone, one may logically conclude that its intended scope is precisely that – to any advertisement by any committee. The justification and authority for a limited interpretation of the statute is virtually identical to that embraced by the Commission when it interpreted the words "any committee" of section 84504 to apply only to primarily formed committees.

Section 84503 states that only those with "cumulative contributions" of $50,000 or more need be disclosed in ballot measure advertisements. Section 84502 defines "cumulative contributions" as beginning the first day the committee's statement of organization is filed under section 84101. Some recipient committees have been in existence for many years, and may not have amended their statements of organization for quite some time. A literal application of the statute could result in the disclosure of large contributions made many years ago for reasons unrelated to the current advertisement for the current ballot measure. This results in potentially misleading disclosures, actually hiding the identities of the *current* "big money" contributors.[14]

[14] For example, consider a general-purpose recipient committee which has been in existence for some time, and which opposed a ballot measure in 1990. A person, *X*, contributed a large amount (more than $50,000) to the

The Commission is not without options. For instance, the Commission may construe the definition of "cumulative contributions" more narrowly (see *infra*, "C"). On the other hand, staff believes the Commission has the same authority to interpret section 84503 more narrowly so that the purpose of the statute is fulfilled. The court, in *Watson v. FPPC,* (1990) 217 Cal.App.3d 1059, reiterated the well-settled rule that "[t]he literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers." In *Creighton v. City of Santa Monica* (1984) 160 Cal. App.3d 1011, the court held that "The words [of an initiative] must be read in a sense which harmonizes [them] with the subject matter and the general purpose and object of the amendment, consistent of course with the language itself." In a comprehensive discussion of the canons of statutory construction, the court, in *Metropolitan Water District of Southern California, et al. v. The Superior Court of Los Angeles County*, (2001) 2001 WL 1230457 (Cal. App. 2 Dist.) noted that "…consideration must be given to the consequences that will flow from a particular interpretation." The court said that the final step in statutory construction "…is to apply reason, practicality, and common sense to the language at hand." Staff believes this interpretation complies with these canons of statutory construction. By limiting the scope of section 84503 to apply only to primarily formed ballot measure committees, awkward results are avoided and the statute is harmonized with other aspects of the Act. Such an interpretation also alleviates the potential need for a regulation defining more narrowly the term "cumulative contributions."

2. Subdivisions (b) and (c) – Independent Expenditure Ads and Slate Mailers.

Subdivision (b) construes the scope of section 84506, which requires disclosure of the two persons making the largest contributions[15] in an advertisement that constitutes an independent expenditure for or against candidates or ballot measures. Put simply, because the statute itself makes clear the period (one year before the election) during which contributions are aggregated, no problems arise when the statute is applied to various committees, even those in existence for many years. Therefore, this regulation interprets section 84506 to apply to any recipient committee. This includes general purpose committees and any other committee that receives contributions totaling $1,000 or more in a year.

Subdivision (c) implements the determination of the court in the Proposition 208 litigation that the advertisement disclosure statutes do not apply to the slate mailer disclosure requirements.

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committee for the 1990 effort. Time passes, and the committee now wants to place a political advertisement for (or against) a current ballot measure. *X* has not contributed to the committee since 1990, and does not do so now. However, since *X's* earlier contribution is still the largest disclosable contribution to the committee, *X* would have to be disclosed on the current advertisements. Not only is this information unhelpful, it may actually be harmful and misleading because it hides the current "big money" contributors from the public and thereby has the potential to defeat the purpose of the statute.

[15] The Commission in the past has interpreted "the two persons making the largest contributions" to mean, consistent with sections 84503 and 84504, contributors of $50,000 or more. Per the Commission's request, that issue is revisited *infra* in section "F" in the discussion of adoption of regulation 18450.4.

Staff recommends the Commission approve moving forward with draft regulation 18450 and notice the regulation for adoption in July 2002.

C. <u>Pre-notice Regulation 18450.2 – Cumulative Contributions</u>.

As discussed above, section 84503 requires in a ballot measure advertisement, a statement identifying any person whose "cumulative contributions" total $50,000 or more. (§ 84503, subd. (a).) That term is defined to mean the aggregated contributions received by a committee from a source beginning the "first day the statement of organization is filed" and ending within seven days of the time the advertisement is sent out for production. By now, the Commission is well aware from its consideration of the scope of sections 84503 and 84504, the difficulty such a period of aggregation poses. If the Commission decides to interpret section 84503 narrowly as recommended above in section "B," (and as the Commission already has done with respect to section 84504), then a regulation further defining "cumulative contributions" may be less necessary. In the event the Commission declines to interpret narrowly section 84503, however, the Commission may yet alleviate some of the problems associated with requiring potentially irrelevant or elusive information by interpreting the period during which contributions are aggregated by section 84502. In this event, staff proposes several options in draft regulation 18450.2.

The argument for sustaining the following interpretation rests largely on the canons of statutory construction cited above. While the statute contains an express provision of the time period to be considered, the draft regulation presents in subdivisions (1) and (2) of draft 18450.2 a different structure. In subdivisions (1) and (2) of proposed regulation 18450.2, staff has drafted language limiting the time period applicable to the "cumulation" of contributions as it applies to sections 84503 and 84504.[16] Staff has presented the Commission with a choice of 12 months or 24 months for cumulating contributions, '**Decision 1**." It can be argued that the 24-month time frame seems best suited to "capturing" the information about "big money" contributors. It can also be argued that a 12-month time frame is more consistent with the statutory scheme because such a time frame is set out as mandatory in Government Code section 84506, dealing with independent expenditure disclosures. It was thought that having one time frame for aggregating contributions, regardless of which disclosure section is applied, might simplify the advertising disclosure scheme.

The options in **Decision 1** of this regulation also work well with the record keeping requirements as outlined in section 84104 and regulation 18401.1. "Still another rule of construction calls for the harmonizing of statutory provisions, if possible." *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7. Currently, the Commission requires records be kept four (4) years for disclosure purposes. It is possible that a committee might not have records

[16] The Commission already determined that the $50,000 contribution threshold of section 84504's committee identification requirements was a *cumulative* threshold.

dating back to when the statement of organization was originally filed, making it difficult, if not impossible to comply with section 84502.

Staff Recommendation: Staff recommends the Commission avoid the unnecessary construction problems associated with narrowing section 84502 and instead pursue the interpretations contained in draft regulation 18450 relating to the scope of sections 84503 and 84504. **By proceeding with draft regulation 18450, the Commission need not adopt a regulation defining "cumulative contributions."**

D. Pre-Notice Regulation 18450.1 – Definition of "Advertisement".

Section 84501 defines the term "advertisement," which circumscribes the scope of the advertising disclosure scheme set out in sections 84503-84511 by laying the basic foundation for what is being regulated. This definitional section also contains a subdivision excluding certain items and communications from the basic definition of "advertisement."

In its last consideration of a regulation defining "advertisement," the Commission directed staff to take a "laundry list" example approach rather than attempt the daunting task of defining the term. Accordingly, draft regulation 18450.1 describes seven groups of materials that are an advertisement under section 84501.

1. The Internet:

At the first pre-notice discussion, concern was expressed regarding the inclusion of the Internet and electronic mail in the definition of "advertisement." It was observed that the Legislature established a Bipartisan Commission on Internet Political Practices to examine the application of the Political Reform Act to the Internet. That Commission currently is scheduled to report to the Legislature by November 2002.[17] In deference to that report, the Commission opted to exclude consideration of the Internet in its definition of advertisement and early draft regulations reflected that decision. While staff does not disagree with the prudence of this approach, staff nevertheless brings to the Commission's attention by way of **Decision 1** of this regulation the issue of including, in the meantime, email messages. During the March gubernatorial primary, at least one candidate sent unsolicited email. (Exhibit 13.) The language in brackets in subdivision (a)(3) includes, in addition to unsolicited telephone messages of a given amount, unsolicited faxes and "electronic" messages. The term "electronic" is envisaged to include unsolicited email, but not so broad as to include messages posted on a website that a person might encounter as a result of one's own web surfing. The Commission may also wish to consider at some point advertisements displayed on a website (such as television advertisements) or downloaded from a website (signs). **Given the opportunity of an upcoming election and the fact that the issues have been crystalized somewhat through actual experience, staff**

[17] The members of the Internet Commission have agreed to explore legislation to extend their report deadline to the end of 2003.

recommends the Commission incorporate the bracketed language including unsolicited facsimiles and electronic messages in the definition of "advertisement."

2. Thresholds:

Decisions 2 - 5 present a choice of minimum thresholds to apply in regulating advertising. The choice, as it relates to telephone messages and direct mailings, now refers to "households" because this more accurately reflects the distribution method for those advertisements. The choice of 200 stems from the already-existing definition of a "mass mailing" found in section 82041.5. However, the Commission is not limited to this existing definition. Thus, staff included other options and in other contexts that may be more appropriate – higher thresholds may become less of a burden on small campaigns and more realistically represent the numbers found in a political campaign target audience. **With regard to Decisions 2 through 5, staff recommends that, for the sake of clarity and simplicity, the Commission adopt the same threshold for each subdivision. Because the number already has significance in terms of existing rules and definitions regarding mass mailings, staff recommends the Commission select "200" as the threshold amount for the respective subdivisions.**

Staff Recommendation: Staff recommends the Commission move forward and **notice regulation 18450.1 for adoption in July 2002.**

E. Adoption of Regulation 18450.3 – Committee Name I.D., Ad Disclosure.

Once the Commission has decided the scope of section 84504's requirements, the Commission must decide how a committee must disclose a contributor's "economic or other special interest" in its name pursuant to subdivision (a) of that statute. **Staff proposes a minor clarifying change from the regulation adopted in January and recommends the Commission adopt Regulation 18450.3 as amended.**

The essence of this regulation is found in subdivision (b)(1), where the Commission sets forth how a committee shall identify in its name the "economic or other special interest" pursuant to section 84504. The Commission adopted a two-step answer that requires the committee identify "any ascertainable *economic* interest" that is likely to be affected by the ballot measure. (Reg. 18450.3, subd. (b)(1).) Only if none exists may the committee then shift to identify "*any goal or purpose*" that is to be affected by the measure. (*Id.*) Staff does not recommend the Commission change this substantive standard.

The only change recommended by staff is deletion of subdivision (d) of the emergency regulation. This subdivision pertains to a different disclosure statute (84506) and merely repeats a requirement already contained in the statute. Because this subdivision is susceptible to being

overlooked and because it adds nothing substantive, **staff recommends the Commission adopt Regulation 18450.3 with the deletion of subdivision (d) from the emergency regulation.** [18]

F. Adoption of Regulation 18450.4 – Contents of Disclosure Statements.

This emergency regulation was adopted by the Commission in January to assist the regulated community in determining the contents of disclosures in advertisements in various contexts, such as television and radio. In addition to these practical considerations, the regulation also requires in subdivision (a), the use of a marker phrase to draw a nexus between the disclosure of the contributor and the contributor's status as a major donor. As discussed above in the memorandum in the analysis of the March primary election, the use of such markers proves helpful in an otherwise busy disclosure environment.

Pursuant to the Commission's request at the January meeting, the regulation in **Decision 1, options A and B**, brings back the issue of whether to import the $50,000 threshold to disclosures required by section 84506.

Section 84506, which sets forth the disclosure requirements applicable to *independent expenditures* for advertising advocating the election or defeat of *"any candidate or any ballot measure,"* includes the phrase "…consistent with any disclosures required by sections 84503 and 84504…." The issue is whether this language is meant to import the $50,000 threshold for disclosure found in the referenced statutes.

Section 84503 requires a disclosure statement triggered by contributions of $50,000 or more. Sections 84504 (a) and (b) also require a trigger of $50,000 or more. Section 84504(c) requires disclosure of the committee name, without reference to any monetary threshold. The language "…consistent with any disclosures required…" can be interpreted as assuring that all disclosure requirements are met in any event, *in addition* to anything required by section 84506, thus importing the $50,000 threshold. This interpretation may balance the intended goal of disclosing the funding behind "hit pieces," while still lending meaning to the phrase in question. Additionally, using the standard $50,000 threshold has the advantage of consistency in what is otherwise a complicated regulatory scheme. This interpretation is contained in brackets in **Option A**.

Otherwise, the Commission may choose **Option B** and require disclosure of those two who have contributed the most during the preceding 12 month period, regardless of the threshold. Staff notes, however, that this may impact smaller committees and campaigns disproportionately, given the generally smaller contributions they receive.

[18] Staff notes for the record that this amendment was made after the regulation was formally noticed for adoption. Nevertheless, staff believes that this is within the scope of the notice. Since the language was included for consideration in the notice, the Commission is within its discretion to delete it from the final adopted version.

Staff recommends the Commission adopt regulation 18450.4 and continue to apply a $50,000 threshold (Option A) to the disclosure requirements.

G. Adoption of Regulation 18450.5 – Amended Advertising Disclosure.

Section 84509 requires that advertising be revised to reflect changed disclosure information when a committee files an amended campaign statement pursuant to section 81004.5. This regulation outlines a timeline within which to amend advertisements to reflect the accurate information. **Staff makes no changes from the emergency version adopted in January and recommends the Commission permanently adopt regulation 18450.5.**

Exhibits:
1. Proposed Regulations
2. Table of Advertising Disclosure Statutes
3. Yes on 40 Campaign Filing
4. Yes on 40 Advertisements
5. Nature Conservancy (Prop 40) Campaign Filing
6. Yes on 42 Campaign Filing
7. Yes on 42 Advertisement
8. No on 42 Campaign Filing
9. Yes on 45 Campaign Filing
10. No on 45 Campaign Filing
11. Yes on 42 Campaign Sign
12. Yes on 42 Stickers
13. News Article on Email Spam